

1 ROBERT M. AMPARAN (172132)
2 506 Broadway
3 San Francisco CA 94133
4 Telephone: 415/986-5591
5
6 Attorneys for Defendant
7 ROBERT MINEMIER
8

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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
15

16 UNITED STATES OF AMERICA, CR-07-0348 MAG
17

18 Plaintiff,

NOTICE OF MOTION AND MOTION FOR
REVIEW OF PERSONNEL FILES AND
DISCLOSURE OF POTENTIAL
IMPEACHMENT EVIDENCE
[UNITED STATES v. HENTHORN]

19 v.

[Excludable Time: 18 U.S.C.
§3161(h)(1)(F) & (J) through
disposition]

20 ROBERT MINEMIER,

Date: August 8, 2007
Time: 1:30 p.m.

21 Defendant.

22 /

23 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE UNITED
24 STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA:

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28 Defendant ROBERT MINEMIER, by and through counsel, will and
hereby does move the Court for an order for discovery of the
personnel files and related records of selected law enforcement
agents employed by the United States Park Police who detained
and arrested Mr. Minemier. Defendant seeks all records and
information which pertain to any instance of conduct which might
arguably reflect on the agents' character or credibility or
which might arguably be used to develop impeachment information.
This includes, but is not limited to, all instances involving
allegations, complaints or acts of:

(1) false arrests;

- 1 (2) fabrication of charges;
- 2 (3) fabrication of evidence;
- 3 (4) unreasonable/illegal searches and seizures under the
- 4 Fourth Amendment to the United States Constitution;
- 5 (5) undue coercion and Miranda violations;
- 6 (6) dishonesty;
- 7 (7) improper tactics;
- 8 (7) neglect of duty;
- 9 (8) prior drug usage; and
- 10 (9) any other instance of conduct reflecting on
- credibility, veracity or potential bias.

11 The information sought by defendant concerning such
12 allegations, complaints or acts includes, but is not limited to,
13 the following:

14 (1) The names, addresses and telephone numbers of persons
15 who submitted any of the allegations or complaints
described above;

16 (2) The names, addresses, and telephone numbers of all
17 persons, whether police officers or private witnesses,
mentioned as witnesses to the events described in the
allegations, complaints or acts described above;

18 (3) A copy of all statements made by the complainants and
19 all witnesses who were interviewed in the
investigation of the allegations, complaints or acts
described above;

20 (4) A copy of all statements made by the officers/agents
interviewed in the investigation of the allegations,
complaints or acts described above;

21 (5) Verbatim copies of all other records, reports, notes
22 and recordings made, and copies of photographs taken,
in the course of the investigation of the allegations,
complaints or acts described above;

23 (6) All agency records and statements of opinion about the
24 agents' reputation relevant to the allegations,
complaints or acts described above, including, but not
25 limited to, findings, letters, formal reports,
26 comments, evaluations, assessments, disciplines
27 imposed, and/or records of conversations involving
28 superiors or fellow agents of the personnel listed

herein pertaining to any of the actions noted in the allegations, complaints or acts described; and

(7) All documents, reports, files, folders, and other documentary material regarding any ongoing investigations being conducted by any entity within the relevant department/agency or the relevant Office of Citizen Complaints related to the allegations, complaints or acts referenced above.

6 Defendant Robert Minemier further requests that he be
7 apprised of any information which tends to show that the
8 information contained in any of the allegations, complaints or
9 acts described above is no longer current, valid or complete.

10 This motion is made on the grounds that the personnel files
11 of the law enforcement agents who investigated this case and who
12 have percipient knowledge and therefore may be called to testify
13 for the prosecution or the defense, are discoverable under the
14 Due Process Clause of the Fifth and Fourteenth Amendments and
15 applicable case law, including Brady v. Maryland, 373 U.S. 83
16 (Kyles v. Whitley, 514 U.S. 419 (1995); and United States
17 v. Henthorn, 931 F.2d 29 (9th Cir. 1991) and their progeny, to
18 the extent that they contain exculpatory information and/or
19 information tending to impeach the credibility of the officers.
20 *In camera* review by the Court is appropriate.

21 This motion is supported by the accompanying Memorandum of
22 Points and Authorities, the files and records in this case, and
23 any further argument and evidence which may be presented at the
24 time of the hearing of this motion.

25 || Dated: July 25, 2007

/s/ ROBERT M. AMPARAN
ROBERT M. AMPARAN
Attorney for Defendant
ROBERT MINEMIER

1 ROBERT M. AMPARAN (172132)
2 506 Broadway
3 San Francisco CA 94133
4 Telephone: 415/986-5591
5
6
7 Attorneys for Defendant
8 ROBERT MINEMIER

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, CR 07-0348 MAG

Plaintiff,
v.
ROBERT MINEMIER,
Defendants.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR REVIEW OF PERSONNEL
FILES AND DISCLOSURE OF
POTENTIAL IMPEACHMENT EVIDENCE
[UNITED STATES v. HENTHORN]

/

INTRODUCTION

This motion asks the Court to order the prosecution to submit to the Court for review all personnel files of all law enforcement agents who detained, investigated, and/or arrested Mr. Minemier. The motion further requests that all information relevant to the credibility of these agents or that would otherwise lead to potentially exculpatory evidence be turned over to the defense¹.

As discussed further below, the defense is entitled to request the Court to undertake an *in camera* review of each of the below-listed agents' personnel files to determine whether

¹ This information can be turned over pursuant to a protective order specifically limiting its future use.

1 exculpatory or impeaching information in those personnel files
 2 must be disclosed to the defense in order to protect the due
 3 process rights of the defendants. The task implicated by this
 4 motion is necessary to assure these rights are protected.

5 Based on the government's disclosures, Mr. Minemier has
 6 identified the following federal law enforcement agent as likely
 7 to testify as a government witness at trial:

8 1. United States Park Police Officer Michael Cameron,
 9 Officer #212, San Francisco Field Office.

10 Defendant also respectfully reserves the right to
 11 specifically identify further law enforcement officers that he
 12 discovers are likely to testify as government witnesses in this
 13 case. This request includes the request for production of the
 14 specific information described herein and recited in the Motion
 15 filed herewith, and any other information which may possibly be
 16 helpful to the defense in this case.

17 ARGUMENT

18 DEFENDANT IS ENTITLED TO ALL RECORDS AND
 19 INFORMATION RELEVANT TO THE IMPEACHMENT OF
THE INVESTIGATING AGENTS

20 The information sought by this motion is relevant to
 21 impeach the testimony and credibility of agents and/or officers
 22 who will be witnesses in this case at a potential suppression
 23 hearings or trial, to prove character traits of the agents in
 24 question, to establish their bias, and to prove their conduct,
 25 custom, propensity and habit in conformity with such traits.

26 The Due Process Clause of the Fifth Amendment requires the
 27 government to produce exculpatory evidence to the defendant.

28 See, e.g., Kyles v. Whitley, 514 U.S. 419, 432-34 (1995); Brady
v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405

1 U.S. 150 (1972). Exculpatory evidence includes all evidence
 2 which bears on witness' credibility or reliability. United
 3 States v. Feola, 651 F.Supp. 1068, 1135 (S.D.N.Y. 1987). Thus,
 4 the law requires that defendants be provided with information
 5 regarding all prior material acts of misconduct by the govern-
 6 ment witnesses. See, e.g., Singh v. Prutny, 142 F.3d 1157 (9th
 7 Cir. 1998), cert. denied, 525 U.S. 956 (1998); United States v.
 8 Siejo, 514 F.3d 1357 (2nd Cir. 1975), cert. denied, 429 U.S.
 9 1043 (1977); United States v. Rosner, 516 F.2d 269 (2nd Cir.
 10 1975), cert. denied, 427 U.S. 911 (1976).

11 Disclosure of impeachment information is necessary to
 12 protect the right of a defendant to confront, cross-examine, and
 13 impeach; this right is a cherished one and remains "the
 14 principal means by which the believability of a witness and the
 15 truth of his [or her] testimony are tested." Davis v. Alaska,
 16 415 U.S. 308, 316 (1974).

17 The Ninth Circuit has noted that the scope of the Brady
 18 doctrine is broad, having been interpreted to compel the
 19 "disclosure of evidence that in any way may be exculpatory."
 20 United States v. Miller, 529 F.2d 1125, 1128 (9th Cir.), cert.
 21 denied, 426 U.S. 924 (1976) (emphasis in original).

22 In United States v. Agurs, 427 U.S. 97, 108 (1976), the
 23 Supreme Court warned prosecutors that if any errors are to be
 24 made, they should be made on the side of disclosure:

25 Because we are dealing with an inevitably
 26 imprecise standard, and because the
 27 significance of an item of evidence can
 28 seldom be predicted accurately until the
 entire record is complete, the prudent
 prosecutor [or court] will resolve doubtful
 questions in favor of disclosure.

1 In Kyles, 514 U.S. 419, the Supreme Court again reminded
 2 prosecutors that convictions will be reversed under Brady,
 3 unless prosecutors use a broader standard of "materiality" than
 4 prosecutors have employed. The Kyles court emphasized that an
 5 important type of exculpatory evidence is evidence which can be
 6 used to attack "the thoroughness and even the good faith of the
 7 investigation." The court specifically recognized that "A
 8 common trial tactic of defense lawyers is to discredit the
 9 caliber of the investigation or the decision to charge the
 10 defendant, and we may consider such use in assessing a possible
 11 Brady violation."

12 In United States v. Cadet, 727 F.2d 1453, 1467-68 (9th Cir.
 13 1984), the Ninth Circuit held that the government must review
 14 agents' personnel files and disclose information which may tend
 15 to impeach law enforcement agents to the defense. *Id.* at 1467-
 16 68. The Ninth Circuit set forth the procedure the prosecution
 17 must follow when confronted with a request by a defendant for
 18 the personnel files of testifying officers. The Cadet Court
 19 stated that the government must "disclose information favorable
 20 to the defense that meets the appropriate standard of material-
 21 ity ... If the prosecution is uncertain about the materiality of
 22 information within its possession, it may submit the information
 23 to the trial court for an *in camera* inspection and evalua-
 24 tion..." *Id.* at 1467-68.

25 In United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991),
 26 cert. denied, 503 U.S. 972, the defendant made a discovery
 27 request for impeachment material contained in the personnel
 28 files of testifying officers. The attorney for the United

1 States refused to follow Cadet and opposed the request. The
 2 United States argued that it had no duty to examine the
 3 personnel files until the defendant made a showing that
 4 instances of specific misconduct were likely to be contained in
 5 the personnel files. The district court agreed. The Ninth
 6 Circuit did not, and reversed and remanded for an *in camera*
 7 review by the district court. The court held that:

8 [t]he government is incorrect in its
 9 assertion that it is the defendant's burden
 10 to make an initial showing of materiality.
 The obligation to examine the files arises
 by virtue of the making of a demand for
 11 their production.

12 *Id.* at 31.

13 In Kyles, the Supreme Court held that it was the duty of
 14 the individual prosecutor to personally inspect agency files and
 15 discover any Brady material in the possession of other agencies.
 16 514 U.S. at 437. The court specifically wrote: "the individual
 17 prosecutor has a duty to learn of any favorable evidence known
 18 to the others acting on the government's behalf in the case,
 19 including the police." *Id.*

20 In Kyles, the state argued that a prosecutor cannot be
 21 required to turn over information he or she does not personally
 22 possess. This argument had previously been accepted by the
 23 Ninth Circuit. See, United States v. Jennings, 960 F.2d 1488
 24 (9th Cir. 1992); United States v. Dominguez-Villa, 954 F.2d 562
 25 (9th Cir. 1992). The Supreme Court rejected that argument and
 26 focused on the personal duty of the individual prosecutor:

27 To accommodate the state in this manner
 28 would, however, amount to a serious change
 of course from the Brady line of cases. In
 the state's favor, it may be said that no

1 one doubts that police investigators sometimes
 2 fail to inform a prosecutor of all
 3 they know. But neither is there any serious
 4 doubt that procedures and regulations can be
 5 established to carry the prosecutor's burden
 6 and to insure communication of all relevant
 7 information on each case to every lawyer who
 8 deals with it. Since, then, the prosecutor
 9 has the means to discharge the government's
Brady responsibilities if he will, any
 argument for excusing a prosecutor from
 disclosing what he does not happen to know
 about boils down to a plea to substitute the
 police for the prosecutor and even for the
 courts themselves, as the final arbiters of
 the government's obligation to ensure a fair
 trial.

10 Kyles, 514 U.S. at 438.

11 Echoing Agurs, the court stated that "this means, naturally,
 12 that a prosecutor anxious about tacking too close to the wind
 13 will disclose a favorable piece of evidence. This is as it
 14 should be." *Id.*

15 Because Kyles, Brady and Giglio are based upon a
 16 defendant's due process right to a fair trial, it should not
 17 matter if the exculpatory information is in the hands of state
 18 or federal officials. "The individual prosecutor has a duty to
 19 learn of any favorable evidence known to the others acting on
 20 the government's behalf in this case, including the police."
 21 Kyles, 514 U.S. at 437.

22 In the instant case, upon defendant's request, the
 23 government should be held responsible for the production of any
 24 and all federal agents files.

25 The Court could assure the impartiality and thoroughness of
 26 the review procedure by use of a magistrate judge, thus, conduct
 27 a judicial *in camera* review. The issues to be determined is one
 28 that is best observed by a neutral arbiter. It is hard to place

1 a finger on such materials if the viewpoint is that of an
 2 advocate whose job is not combing documents for impeachment
 3 material. Similarly, there is an institutional bias.
 4 Impeachment material affecting credibility can and should
 5 include whether the officer has engaged in shading of the truth,
 6 "mischaracterizations" of fact short of perjury, or improper
 7 police practices.

8 The Justice Department policy stated in footnote 3 of
 9 Jennings, *supra*, may be the worst alternative, from the point of
 10 view of assuring the fairness of a review. It smacks of the fox
 11 guarding the chicken coop. According to the opinion, "the
 12 Department of Justice has instituted a policy designed to
 13 implement the holding of Henthorn. Under this policy, the files
 14 of law enforcement officers are to be examined by the
 15 appropriate agency's attorney or his staff. The agency legal
 16 staff will notify the federal prosecutor assigned to the case if
 17 any potential Brady material is found, and the AUSA will then
 18 determine whether the information should be disclosed or whether
 19 an *in camera* review by the district court is appropriate." 960
 20 F.2d at 1492, note 3.

21 The defense urges most strenuously against this procedure
 22 for the obvious reason that an agency's legal staff has every
 23 motive to hide material which the defense should properly
 24 receive by "characterizing" them as non-exculpatory. While it
 25 is true that under Kyles, the United States Attorney would be
 26 charged with the Brady violation if exculpatory material was
 27 disclosed later which was earlier withheld and reversal of a
 28 conviction could result, it is hard to conceive of how

1 suppression of evidence by an agency's legal counsel would be
2 uncovered.

3 CONCLUSION

4 For the reasons stated, defendant, Robert Minemier,
5 respectfully requests that this Court order production and an *in*
6 *camera* review of the personnel files of the law enforcement
7 agents and officers listed above. Upon a determination that any
8 file contains material relevant to impeachment or potentially
9 exculpatory evidence, the materials should be disclosed to
10 defense counsel subject to a protective order that the infor-
11 mation should be used only for purposes of this case.

12 Dated: July 25, 2007

13 Respectfully submitted,

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15 /s/ ROBERT M. AMPARAN
16 ROBERT M. AMPARAN

17 Attorney for Defendant
18 ROBERT MINEMIER

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LAW OFFICES

506 BROADWAY
SAN FRANCISCO
(415) 986-5591
Fax: (415) 421-1331

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